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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 75-359

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Petitioners*,

vs.

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Dated: September 5, 1975

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No.

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Petitioners,*

VS.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioners, the People of the State of California and the Public Utilities Commission of the State of California (California), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on April 25, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals and its order denying rehearing are not yet reported and are printed in Appendices A and B respectively. The Federal Power Commission's (Commission) Order Accepting For Filing Tendered Tariff Sheets, Establishing Procedures, and Granting Interventions in Transwestern Pipeline Company, Docket No. RP73-101, issued May 31, 1973, is reported at 49 FPC 1243 and is printed in Appendix C. The Commission's Order Denying Rehearing and Reconsideration, Instituting Complaint Proceeding and Establishing Procedures in Docket No. RP73-101, issued August 1, 1973 is reported at 50 FPC 343 and is printed in Appendix D. The Commission's Order Denying Motion to Vacate and Set Aside Prior Order and Granting Motions For Stay of Procedural Dates in Docket No. RP73-101, issued September 21, 1973 is not reported and is printed in Appendix E.

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1975. The order of the court denying petitions for rehearing was issued June 9, 1975 (App. B, *infra,* p. v-vi). The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1) and Sec. 19(b) of the Natural Gas Act, 15 U.S.C. Sec. 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission may, pursuant to Section 4 of the Natural Gas Act, accept tariff sheets establishing curtailment procedures and affecting rates without substantial evidence and without a hearing.

2. Whether the Federal Power Commission may lawfully shift the burden of proof normally placed upon an applicant making a filing under Section 4 of the Natural Gas Act to an intervenor pursuant to Section 5 of the Act.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. Sections 717-717w, are set forth in Appendix F.

STATEMENT OF THE CASE

This case arises because the Commission has by Order accepted without evidence or hearing tariff sheets filed by Transwestern Pipeline Company (Transwestern) which place into effect, on Transwestern's pipeline system, a set of curtailment priorities to operate when curtailment of gas service by Transwestern is necessary due to impaired deliveries for any cause. The tariff sheets also have a rate impact in that they contain provisions to eliminate demand charge adjustment credits during certain curtailments.

Transwestern purchases natural gas, as that term is defined in Sec. 2(5) of the Natural Gas Act (15 U.S.C. Sec. 717b). It transports such gas through its pipeline system and resells it in interstate commerce to Pacific Lighting Service Company under the regulatory supervision and jurisdiction of the Commission. Pacific Lighting Service Company in turn sells gas to Southern California Gas Company, a distributor of natural gas for ultimate consumption in California and subject to the jurisdiction of the California Public Utilities Commission.

Proceedings before the Commission were initiated when Transwestern tendered for filing in Docket No. RP73-101 proposed changes in its FPC Gas Tariff, First Revised Volume No. 1, pursuant to Section 4 of the Natural Gas Act (15 U.S.C. Sec. 717c).

The Commission had previously promulgated a statement of general policy with respect to measures to be taken for the protection of reliable and adequate service to the extent possible given present natural gas supplies and capacities (See Order Promulgating Statement of General Policy, Order No. 431, Docket No. R-418, 45 FPC 570 (1971)).

The Commission, in Order No. 431, stated that:

> "Pipelines responding that curtailment will be necessary will file a tariff sheet, pursuant to Sections 4 and 5 of the Natural Gas Act and the Commission's Regulations thereunder, setting forth a curtailment plan to effectuate the instant policy, or state that the curtailment program, if any, currently on file will effectuate this policy." (45 FPC 570, 572)

Order No. 431 was supplemented on January 8, 1973, when the Commission issued a statement of policy announcing a system of priorities to apply nationally to all jurisdictional pipelines during periods of curtailment (See *Utilization and Conservation of Natural Resources,* Docket No. R-469, Order No. 467, 49 FPC 85 (1973); Order No. 467-A, 49 FPC 217 (1973); Order No. 467-B, 49 FPC 583 (1973)). Being a policy statement, the orders issued in Docket No. R-469 gave indication to the world of a system of curtailment priorities which would be favored by the Commission. The system of priorities proposed by Transwestern's filed tariffs herein are identical to those enumerated in the Docket No. R-469 statement of policy orders.

The Commission issued a notice of the proposed changes in Transwestern's FPC Gas Tariff on May 4, 1973, and California timely filed a notice of intervention with the Commission. Subsequently, the Commission issued its Order Accepting For Filing Tendered Tariff Sheets, Establishing Procedures, And Granting Interventions on May 31, 1973, of which California complains herein. Therein the Commission, after stating that Transwestern's proposed curtailment plan reflected priorities for curtailment consistent with those set forth in Order No. 467, ordered that Transwestern's tariff sheets be accepted for filing effective June 1, 1973.

Having denied a request for a hearing, the Commission stated:

> "Any petitioner can, of course, file a petition for extraordinary relief from application of the filed curtailment plan or file a complaint under Section 5(a) of the Natural Gas Act, if his objections relate instead to systemwide aspects of the curtailment plan" (App. C, p. x).

California timely filed an application for rehearing of that order pursuant to Section 19(a) of the Natural Gas Act (15 U.S.C. Sec. 717r(a)) and Section 1.34 of the Commission's Rules of Practice and Procedure. On August 1, 1973 the Commission issued its Order Denying Rehearing And Establishing Procedures (App. D).

However, the Commission in its order denying rehearing determined that the pleadings presented issues that in its judgment should be adjudicated on the basis of an evidentiary record. Accordingly, it elected to consider the application for rehearing filed by California as a complaint filed under Section 5, and ordered a hearing thereon, where California would have the burden of proof to show that the curtailment plan accepted by the Commission is unjust, unreasonable, or unduly discriminatory. This is to be contrasted with the practice under Section 4, where the burden of proof is on the pipeline company to show that the proposed change is just and reasonable.

On August 30, 1973, California filed its petition for review of the Commission's orders of May 31, 1973, and August 1, 1973, with the United States Court of Appeals for the Ninth Circuit in Docket No. 73-2665. By order dated September 13, 1973, the Court of

Appeals consolidated California's petition for review with those filed by Pacific Lighting Service Company and Southern California Gas Company in Nos. 73-2538 and 73-2922, and Southern California Edison Company in No. 73-2630. The matter was briefed by the parties and oral argument was heard on April 3, 1975.

The Court of Appeals, by opinion issued April 25, 1975, upheld the Commission's orders and dismissed the consolidated petitions for review. The Court of Appeals held that the Commission on the facts before it and in light of this Court's ruling in *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), had discretion to hold hearings either under Section 4 or Section 5. That is to say, as to the newly filed tariff pages in Docket No. RP73-101, the Commission must hold hearings, but that it could do so under either Section 4 or Section 5 of the Act.

Petitions for rehearing were filed by each of the petitioners in the consolidated cases and by order issued June 9, 1975, the Court of Appeals denied those petitions.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals creates serious problems in the scheme of regulation of the sale for resale and transportation of natural gas in interstate commerce. Broadly, the decision of the court below affects the entire process of rate regulation under the Natural Gas Act. Specifically, it allows the Commis-

sion to authorize changes in tariff schedules without the benefit of hearings or evidence and it allows the Commission to cavalierly shift the burden of proof between the parties in Commission proceedings. This Court has on many occasions measured and defined the Commission's jurisdiction and authority under the Natural Gas Act. Recently, this Court upheld the Commission's authority to require pipeline companies to develop and submit for approval rational arrangements for curtailment of interstate gas deliveries in times of gas shortage (*Federal Power Commission v. Louisiana Power & Light Co., supra*). In view of the nationwide importance of the subject of curtailment under the Natural Gas Act, this Court should decide whether the Commission has acted lawfully in carrying out its authority over curtailment of interstate gas deliveries.

Since approximately 1970, most of the interstate natural gas companies have experienced a shortage of gas supplies with which to fulfill their contractual obligations. This has resulted in the filing by pipeline companies with the Commission of tariff changes incorporating various plans for curtailment of gas deliveries in times of shortage. Both Transwestern and El Paso Natural Gas Company, the two interstate pipeline companies which together supply a majority of California's requirements for natural gas, have filed curtailment plans for approval by the Commission. As noted above, the Commission itself has issued several policy statements regarding curtailment of natural gas (See Orders Nos. 431, 467, 467-A, and 467-B, *supra*).

These policy statements and other Commission decisions regarding curtailment have been submitted to various U.S. Courts of Appeal and to this Court for review.[1] There has emerged from the several decisions of the U.S. Courts of Appeal and from this Court dealing with the Commission's authority to supervise curtailment of interstate deliveries of gas a framework of regulation within which the Commission must exercise its curtailment authority.

The decision of the court below is contrary to this developing legal framework and could operate to render it useless.

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1. THE COMMISSION MAY NOT LAWFULLY ALLOW TARIFF CHANGES TO BECOME PERMANENTLY EFFECTIVE WITHOUT SUBSTANTIAL EVIDENCE.

The Commission's authority to establish an orderly curtailment plan involving both direct sales and sales for resale was firmly upheld by this Court in *Louisiana Power & Light, supra.* This Court, having found

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[1]See *Federal Power Commission v. Louisiana Power & Light Co., supra,* (whether the Commission has the power to require a curtailment plan which includes deliveries to both resale and direct sale customers); *Pacific Gas & Electric Co. v. Federal Power Commission,* 506 F.2d 33 (D.C. Cir. 1974) (whether the Commission's policy statement regarding curtailment in Order No. 467 is reviewable); *State of Louisiana v. Federal Power Commission,* 503 F.2d 844 (5th Cir. 1974) (Commission has authority to promulgate a gas service curtailment plan provided it does so on the basis of sufficient record evidence); *Consolidated Edison Co. of New York v. Federal Power Commission,* 512 F.2d 1332 (D.C. Cir. 1975) (Commission has authority under Section 4 to allow interim curtailment plans to become effective pending hearings and the submission of evidence); *American Smelting & Refining Co. v. Federal Power Commission,* 494 F.2d 925 (D.C. Cir. 1974) cert. denied 42 L.Ed. 2d 122 (1974) (Commission has authority to approve interim curtailment plan based upon end use considerations).

that the Commission's mandate set forth in Section 4(b) of the Act to eliminate discrimination in service required it to establish a system of curtailment, stated:

> "Two procedural mechanisms are available to enforce this antidiscriminatory provision of Sec. 4(b). *As to a tariff already on file and in effect,* FPC may proceed under Sec. 5(a). The Sec. 5(a) procedure has substantial disadvantages, however, rendering it unsuitable for the evaluation of curtailment plans. FPC must afford interested parties a full hearing on the reasonableness of the tariff before taking any remedial action, and as we have observed, 'the delay incident to determination in Sec. 5 proceedings through which initial certificated rates [as well as "practices" and "contracts"] are reviewable appears nigh interminable.' *Atlantic Refining Co. v. Public Service Commission,* 360 U.S. 378, 389 (1959). In addition a prescribed remedial order can have only prospective application. FPC has therefore chosen to process curtailment plans under Secs. 4(c), (d), and (e). Under these provisions, a pipeline's tariff amendments filed with FPC go into effect in 30 days unless suspended by the Commission. *If a filing is challenged or FPC of its own motion deems it appropriate,* it may suspend the amended tariff for up to five months, at the end of which time the amended tariff becomes effective pending the completion of hearings. In these hearings, the pipeline has the burden of proving that its plan is reasonable and fair" (Footnotes omitted, emphasis added).

Where "a tariff is on file and in effect" the Commission may proceed under Section 5(a), either upon

its own motion or upon complaint, to investigate and require changes to be made in the filed tariff. However, this Court has clearly held in *Louisiana Power & Light, supra,* that where a new tariff filing is made pursuant to Section 4, the tariff may become effective prior to the completion of evidentiary hearings, but the tariff cannot become permanently effective without hearings and/or substantial evidence that it is just and reasonable.

In the instant proceeding, the court below has affirmed the Commission's approval of a newly filed rate without evidence or a hearing. The court below has approved this practice, stating:

> "The Supreme Court has not, on the merits, held that the Commission must hold curtailment-plan hearings under either Section 4 or Section 5 of the Natural Gas Act. However, in *FPC v. Louisiana Power & Light Co.,* 406 U.S. 621 (1972), the Court expressed a preference for Section 4 hearings. 406 U.S. at 643-44" (App. A, p. iii).

California must respectfully disagree with the statement of the court below. We believe that this Court's holding in the *Louisiana Power & Light* case is clear. This Court discussed the two procedural mechanisms available to the Commission to enforce the "antidiscriminatory" provision of section 4(b). Both of those mechanisms require hearings. Prior to taking remedial action pursuant to Section 5 the Commission must "afford interested parties a full hearing on the reasonableness of the tariff" (406 U.S. at 643). Under Section 4, a pipeline's tariff changes go into effect in

30 days unless suspended. If a filing is challenged, the FPC may suspend the tariff change up to 5 months at the end of which period it becomes effective pending the completion of hearings (406 U.S. at 645).

The Commission has acted in this matter without having conducted a proceeding to adduce substantial evidence to support its action as required by *Mobil Oil Co. v. Federal Power Commission, et al.*, 483 F.2d 1238 (D.C. Cir. 1973). As the court reasoned in *Mobil:*

> "From this outline of the meaning of 'substantial evidence,' we can perceive the sort of procedures required. Clearly some evidence supporting the FPC's finding must be in the record. *More importantly for our purposes, the rule that the 'whole record' be considered—both evidence for and against—means that the procedures must provide some mechanism for interested parties to introduce adverse evidence and criticize evidence introduced by others.* This process of introduction and criticism helps assure that the factual basis of the FPC rates will be accurate and provides the reviewing court with a record from which it can determine if the agency has properly exercised its discretion" (483 F.2d at 1258-59).

The Commission has stated in its brief to the court below that the only essential finding necessary to its action was that Transwestern's proposed curtailment plan was in conformance with Order No. 467 and that such is evidenced by a simple comparison of the two. Thus the Commission has utilized its general policy statement regarding curtailment as substantial evi-

dence of the justness and reasonableness of Transwestern's proposed curtailment plan.

It was clearly enunciated by the Court of Appeals for the Fifth Circuit that substantial evidence is required in a curtailment case (*State of Louisiana v. Federal Power Commission, supra*). A similar holding was reached in the *Consolidated Edison* case, *supra*. That the Commission cannot be permitted to rely upon a policy statement in meeting the substantial evidence test is clearly stated in the *Pacific Gas & Electric* case, *supra*, wherein the court said:

> ". . . when the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy" (506 F.2d at 38-39; footnote omitted).

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2. THE COMMISSION MAY NOT LAWFULLY SHIFT THE BURDEN OF PROOF TO A PROTESTING INTERVENOR TO SHOW THAT AN AMENDED TARIFF IS UNJUST AND UNREASONABLE.

At the time of its intervention in these proceedings, California believed that it would be entitled to a hearing under Section 4 of the Natural Gas Act whereby Transwestern would carry the burden of demonstrating the reasonableness and non-discriminatory character of its curtailment tariff as it affected individual geographic areas and consumers. California's belief was buttressed by this Court's opinion in *Louisiana Power & Light, supra*.

By its order herein adopting a curtailment plan without suspension the Commission has not provided for a hearing under Section 4 of the Act in which "the pipeline has the burden of proving that its plan is reasonable and fair". Rather the Commission provides for the filing of petitions for extraordinary relief or for complaints under Section 5. In so doing the Commission shifts the burden of proof to those affected by curtailment contrary to the understanding of the Court in *Louisiana Power & Light, supra,* and contrary to its own declaration in Order No. 467-B that it did not foreclose its power to proceed under Section 4.

Shifting the burden of proof clearly affects the substantive rights of California. In *Philadelphia Co. v. Securities and Exchange Commission,* 175 F.2d 808 (D.C. Cir. 1948) the S.E.C. had determined that a company, which had earlier been granted an exemption under the Public Utility Holding Company Act of 1935, 15 U.S.C. 379, must later carry the burden of showing that it should not be deprived of such exemption. The court held that the S.E.C. had erroneously failed to assume the burden of proof regarding its proposed action.

In view of the announced primary purpose of the Natural Gas Act "to protect consumers against exploitation at the hands of natural gas companies", *Federal Power Commission v. Hope Natural Gas Company,* 320 U.S. 591 (1944), the shifting of the burden of proving the reasonableness or unreasonableness of a curtailment plan to consumers merely because the Commission has announced as a matter of policy that

it would accept certain curtailment plans without suspension, completely subverts the intent of Congress. The action of the Commission in this regard presents a classic confrontation with the avowed purpose of the Natural Gas Act.

CONCLUSION

In view of the nationwide importance of an equitable and workable regulatory framework for the development of natural gas curtailment plans and inasmuch as the decision of the court below seriously endangers the orderly development of this regulatory framework, California respectfully requests the opportunity to present this question to the Court more fully.

California respectfully submits that this petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Dated: September 5, 1975

Respectfully submitted,

RICHARD D. GRAVELLE,

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Attorneys for Petitioners the People of the State of California and the Public Utilities Commission of the State of California.

(Appendices Follow)

Appendix A

United States Court of Appeals for the Ninth Circuit

Pacific Lighting Service Company, Petitioner, vs. Federal Power Commission, Respondent.	No. 73-2538
Pacific Lighting Service Company and Southern California Gas Company, Petitioners, vs. Federal Power Commission, Respondent.	No. 73-2922
Southern California Edison Company, Petitioner, vs. Federal Power Commission, Respondent.	No. 73-2630
The People of the State of California and The Public Utilities Commission of the State of California, Petitioners, vs. Federal Power Commission, Respondent.	No. 73-2665

[April 25, 1975]

On Petition for Review of Orders of the Federal Power Commission

OPINION

Before: CHAMBERS, CHOY, and GOODWIN, Circuit Judges.

PER CURIAM:

Petitioners, consumers of natural gas, seek review of the Federal Power Commission's order in *Transwest-*

ern Pipeline Company (FPC No. RP 73-101) approving Transwestern's proposed tariffs which set forth nine curtailment priorities to provide for reduction of delivery to natural gas users during times of resource shortage.

The petitioners challenge the Commission's procedure. First, the petitioners assert that Commission Order No. 467, establishing guidelines for curtailment schemes, is invalid because not promulgated in accordance with Administrative Procedure Act (5 U.S.C. §§ 51 *et seq.)* rule-making procedures. If petitioners could strike down Order No. 467, they would feel more secure in attacking Transwestern's curtailment priorities, because the challenged tariffs track Order No. 467 almost haec verba. Order No. 467 is, however, a statement of Commission policy, and not a "rule". It is therefore exempt from the APA's notice and hearing requirements. *See* 5 U.S.C. § 553(b)(3) (A).

The petitioners further insist that they were entitled to a pre-approval hearing under Section 4 of the Natural Gas Act, 15 U.S.C. § 717c(e),[1] in which the pipeline company would have the burden of proving that its proposed curtailment schedules were just and reasonable. The Commission contends that hearings pursuant to Section 5 of the Natural Gas Act, 15 U.S.C.

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[1] 15 U.S.C. 717c(e):

"Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service * * *. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company * * *."

§ 717d,[2] to be held after the tariffs are provisionally approved, satisfy the requirements of relevant statutory and case law, although in such hearings the burden of proof falls upon those objecting to the filed tariffs (the petitioners).

The Supreme Court has not, on the merits, held that the Commission must hold curtailment-plan hearings under either § 4 or § 5 of the Natural Gas Act. However, in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), the Court expressed a preference for § 4 hearings. 406 U.S. at 643-644.

In this case the Commission apparently believed that the Court's expressed preference for § 4 hearings did not foreclose FPC discretion to hold § 5 hearings. We construe § 4's "shall have authority" language to make the holding of hearings under that section discretionary rather than mandatory. We cannot say that the Commission abused its discretion in ordering § 5 hearings on the facts before it in these cases.

However, we assume that the Commission has noted that in *Louisiana Power* the Supreme Court stated: "[t]he FPC must afford interested parties a full hearing on the reasonableness of the tariff * * *."

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[2] 15 U.S.C. § 717d(a):

"Whenever the Commission, after a hearing had upon its own motion or upon complaint of any * * * gas distributing company, shall find that any * * * classification demanded * * * by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any * * * contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable * * * classification * * * or contract to be thereafter observed and in force, and shall fix the same by order * * *."

406 U.S. at 643. These observations apply equally to § 4 and § 5 hearings. The Commission's choice of § 5 as the hearing format for evaluation of objections to Transwestern's curtailment plan does shift the burden of proof, but does not necessarily deprive the petitioners of a full and fair opportunity to present facts bearing upon the reasonableness of the curtailment priorities.

We express no opinion upon the merits of issues that may be developed in future hearings before the Commission at the request of these petitioners. Counsel for the Commission has represented to this court that hearings will be available to petitioners, and we will assume until the contrary appears that these hearings will meet the fairness standards of *Louisiana Power.*

We note further that the Commission agrees that it is required, and plans, to comply with the National Environmental Policy Act of 1969, §§ 102, 105, 42 U.S.C. §§ 4332, 4335. *See State of Louisiana v. FPC,* ..... F.2d ..... (5th Cir. 1974).

Accordingly, these consolidated petitions are dismissed.

Appendix B

United States Court of Appeals for the Ninth Circuit

Pacific Lighting Service Company, Petitioner, vs. Federal Power Commission, Respondent.	No. 73-2538
Pacific Lighting Service Company and Southern California Gas Company, Petitioners, vs. Federal Power Commission, Respondent.	No. 73-2922
Southern California Edison Company, Petitioner, vs. Federal Power Commission, Respondent.	No. 73-2630
The People of the State of California and The Public Utilities Commission of the State of California, Petitioners, vs. Federal Power Commission, Respondent.	No. 73-2665

[June 9, 1975]

On Petition for Review of Orders of the Federal Power Commission.

ORDER

Before: CHAMBERS, CHOY and GOODWIN, Circuit Judges.

The court having considered the matter,

The petition for rehearing filed May 9, 1975, by Southern California Gas Company and Pacific Lighting Service is denied;

The petition for rehearing filed May 9, 1975, by The People of the State of California and The Public Utilities Commission of the State of California is denied;

The petition for rehearing filed May 9, 1975, by Southern California Edison Company is denied.

Appendix C

United States of America
Federal Power Commission

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Rush Moody, Jr.

Transwestern Pipeline Company	Docket No. RP73-101

ORDER ACCEPTING FOR FILING TENDERED TARIFF SHEETS, ESTABLISHING PROCEDURES, AND GRANTING INTERVENTIONS

(Issued May 31, 1973)

On April 25, 1973, Transwestern Pipeline Company (Transwestern) tendered for filing proposed tariff sheets to its FPC Gas Tariff, First Revised Volume No. 1.[1] The tendered tariff sheets establish curtailment procedures, eliminate demand charge adjustment credits during certain curtailments, and incorporate minor changes in the wording of certain sections so as

[1]Designated as: Thirty-first Revised Sheet No. 4, Twenty-sixth Revised Sheet No. 6-A, Second Revised Sheet No. 6-B, First Revised Sheet No. 6-C, Tenth Revised Sheet No. 6-D, First Revised Sheet No. 6-E, Third Revised Sheet No. 30, Original Sheet No. 30-A, Original Sheet No. 30-B and Third Revised Sheet No. 32-A to Transwestern's FPC Gas Tariff, First Revised Volume No. 1.

to include reference to Section 11 of the General Terms and Conditions where appropriate. Transwestern requests an effective date of June 1, 1973.

Transwestern states that although it has taken all reasonable and prudent steps to avoid a gas supply shortage, these tariff revisions are necessary since it is faced with the definite possibility of reducing natural gas deliveries in the near future.

Transwestern's nine categories contained in Section 11.3 are identical to those enumerated in Docket No. R-469. The currently effective Section 11.3 pertains only to force majeure depletion of gas supply involving Rate Schedules CDQ-1 and LX and these schedules are available only to Pacific Lighting Service Company. The revised Section 11.3 applies to Rate Schedules CDQ-1, CDQ-2, and CDQ-3. Cities Service Gas Company is the only CDQ-2 or CDQ-3 buyer. The remaining Rate Schedules are not subject to the proposed curtailment procedures. No deliveries are being made under Rate Schedule LX and Rate Schedules SG-1 and RW-1 are to small customers and towns constituting less than 0.4 percent of Transwestern's total 1971 sales. The CDQ schedules accounted for 98.9 percent of 1971 sales. The remaining 0.7 percent of 1971 sales were emergency, field and mainline residential, commercial or industrial sales.

The revised Section 11.3 provides for a pro-rata curtailment within each of the nine categories based on each customer's percentage of total entitlement within each priority when curtailment is necessary due to impaired deliveries of any cause. This section

contains an emergency provision to provide relief from environmental emergencies or to forestall irreparable injury to life or property. After buyer establishes that an emergency exists, Transwestern will exempt buyer from curtailment to the extent it is able without creating other emergencies on its system.

Transwestern's proposed new Sections 11.4 and 11.5 eliminate demand charge adjustment credits where curtailment of deliveries is due to a gas supply shortage or to compliance with directives of governmental agencies. Transwestern states that it will bear a share of the costs of curtailment through the fixed costs component included in commodity rates.

Petitions to intervene were filed by the following parties: The People of the State of California and the Public Utilities Commission of the State of California on May 18, 1973; San Diego Gas & Electric Company on May 18, 1973; Cities Service Gas Company on May 22, 1973; Southern California Edison Company on May 22, 1973; and Pacific Lighting Service Company and Southern California Gas Company on May 22, 1973.

As previously noted, we take cognizance of the fact that the Transwestern filing reflects priorities for curtailment consistent with our Statement of Policy in Docket No. R-469 issued on January 8, 1973. Petitioners Pacific Lighting Service Company and Southern California Gas Company seek a suspension of the tendered filing for the full statutory period. However, no specific grounds are stated in support of the requested

suspension. In light of the foregoing we will not suspend Transwestern's tendered tariff filing. Any petitioner can, of course, file a petition for extraordinary relief from application of the filed curtailment plan or file a complaint under Section 5(a) of the Natural Gas Act, if his objections related instead to system-wide aspects of the curtailment plan. Furthermore, should a dispute arise regarding the end-use data to be submitted to Transwestern, as hereinafter ordered, we will at that time act on motions related thereto.

The Commission finds:

(1) It is necessary and appropriate in carrying out the provisions of the Natural Gas Act that the proposed tariff sheets tendered by Transwestern on April on April 25, 1973, should be accepted for filing.

(2) The participation in this proceeding of the above named petitioners may be in the public interest.

The Commission orders:

(A) Transwestern's tariff sheets, hereinbefore described, are hereby accepted for filing effective June 1, 1973.

(B) A Staff conference for the purpose of seeking means to obtain end-use and other relevant data shall be held with all parties on June 15, 1973, at 10:00 a.m. (EDT) in a conference room of the Federal Power Commission.

(C) Transwestern must submit end-use data to the Commission and serve it on all interveners on or before July 16, 1973.

(D) The above-mentioned petitioners are hereby permitted to intervene in this proceeding subject to the Rules and Regulations of the Commission; *Provided, However,* that the admission of such interveners shall not be construed as recognition that they or any of them might be aggrieved because of any order or orders issued by the Commission in this proceeding. If the petitioners wish to allege specific grounds for intervention, they may file separate applications for special relief or complaints under Section 5(a) of the Natural Gas Act.

By the Commission.

(SEAL) Kenneth F. Plumb,
Secretary.

Appendix D

United States of America
Federal Power Commission

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.

Transwestern Pipeline Company	Docket No. RP73-101

ORDER DENYING REHEARING AND RECONSIDERATION, INSTITUTING COMPLAINT PROCEEDING, AND ESTABLISHING PROCEDURES

(Issued August 1, 1973)

By order issued May 31, 1973, the Commission, *inter alia,* accepted for filing tariff sheets, tendered by Transwestern Pipeline Company (Transwestern),[1] and established procedures for filing of end-use data.[2] Applications for rehearing were filed on July 2, 1973, by Pacific Lighting Service Company (PLSC), Southern California Gas Company (SoCal), and the Peo-

[1]The tariff sheets contained Transwestern's proposed curtailment plan reflecting priorities for service during curtailment consistent with our Statement of Policy issued in Docket No. R-469.

[2]By notice issued July 11, 1973, the time for filing the data was extended to September 24, 1973.

ple of the State of California and the Public Utilities Commission of the State of California (California). On July 13, 1973, and July 25, 1973, San Diego Gas & Electric Company (San Diego) and Southern California Edison Company (Edison) respectively filed a motion requesting permission to file an application for rehearing out-of-time and attached the application to its motion.[3]

In their applications for rehearing, Petitioners urge reconsideration of our acceptance of Transwestern's propose curtailment plan and, upon reconsideration, instituting a hearing under Section 4 of the Natural Gas Act to determine the lawfulness of that plan. While Petitioners broadly allege the impropriety of the order of priorities established by Transwestern's filing, their concern appears to be directed more to their position on the priority scale than urging the impropriety of the priorities themselves. For example, PLSC, SoCal, and San Diego allege that a Section 4 hearing is necessary to determine that the priorities "are appropriate and nondiscriminatory" (p. 4). They then argue that the application of those priorities may be unlawful against Transwestern's California customers, who are required under the regulations of the California Public Utilities Commission to provide only interruptible service to industrial consumers in excess of 200 Mcf per day. California, on the other hand,

[3]We will grant the motions since such action will neither delay the determination of this proceeding nor adversely affect any party to this proceeding. However, the filing will be accepted and treated as motions for reconsideration.

urges rehearing on the basis, *inter alia,* of the need to expand priority (2) to include interruptible sales (p. 7) and the need for considering storage and partial requirements customers in formulating the curtailment plan (pp. 8-9), while also urging the possible discrimination of the priority list on the California customers based on its "interruptible" requirement (pp. 4-6). Accordingly, the need to initiate a Section 4 hearing to determine the lawfulness of the priorities *per se* has not been demonstrated.

The application for rehearing filed by California, unlike the joint application of PLSC and So Cal, does not state that a hearing under Section 5 of the Act is not requested. The pleadings present issues that, in our judgment, should be adjudicated on the basis of an evidentiary record. Accordingly, we will consider the application filed by California as a complaint filed under Section 5 and order a hearing thereon, wherein California, as complainant may have the opportunity to present evidence to sustain its burden of showing that; (a) the plan unduly discriminates against California customers.

(b) Priority (2) should be enlarged to include interruptible service, and (c) the list of priorities should be modified to include consideration for customers who have storage facilities and for partial requirements customers.[4]

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[4]California's further argument on the application of the National Environmental Policy Act in curtailment proceedings was refuted by the Commission in its order issued August 22, 1972, in *El Paso Natural Gas Company,* Docket No. RP72-6.

The Commission finds:

(1) Good cause exists to grant San Diego's and Edison's motions and permit them to file an application for rehearing out-of-time which will be treated as motions for reconsideration.

(2) The assignments of error and grounds for rehearing set forth in the applications for rehearing and motions for reconsideration of our May 31, 1973, order issued in this proceeding present no new facts or principals of law which were not considered by the Commission when it issued its order or which having now been considered warrant any change in said order.

(3) It is necessary and proper for the purpose of carrying out the provisions of the Natural Gas Act that California's application for rehearing be treated as a complaint filed under Section 5 of the Natural Gas Act and that a hearing be initiated and the procedures established for the hearing, all as hereinafter ordered.

The Commission orders:

(A) The motions filed by San Diego and Edison on July 13, 1973 and July 25, 1973, respectively requesting permission to file an application for rehearing out-of-time is hereby granted.

(B) The applications for rehearing filed in this proceeding by PLSC, So Cal, and California, are hereby denied. The applications for rehearing and treated as motions for reconsideration filed by San Diego and Edison are hereby denied.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by the Natural Gas Act, particularly Sections 5, 14, 15, and 16 thereof, a hearing on the complaint filed by California shall be convened concerning the issues of why Transwestern's California customers should not adhere to the list of curtailment priorities set forth in Transwestern's tariff, why priority (2) in that list should be modified to include interruptible service, and why the list of priorities should be modified to include consideration for customers who have storage facilities and for partial requirements customers.

(D) Answers and responses to the complaint under Section 1.6(a) of our Rules of Practice and Procedure, are hereby waived, without prejudice.

(E) As established by our notice of July 11, 1973, Transwestern shall serve its end-use data on all parties in this proceeding including Commission staff, on or before September 24, 1973. California and parties in support of California's stated contentions shall serve their cases-in-chief in response to ordering paragraph (C) above on all parties to this proceeding including Commission staff, on or before October 25, 1973.

(F) Pursuant to the authority contained in and subject to the jurisdiction conferred on the Federal Power Commission by the Natural Gas Act, particularly Sections 5, 14, 15, and 16 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the Regulations under the Natural Gas Act, a

public hearing shall be convened on November 19, 1973, at 10:00 a.m. (EST) at the offices of the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D. C. 20426 concerning the issues involved in the proceeding initiated in ordering paragraph (C) above.

(G) An Administrative Law Judge to be designated by the Chief Administrative Law Judge for that purpose [see Delegation of Authority, 18 CFR 3.5 (d)], shall preside at the hearings in this proceeding, and shall prescribe relevant procedural matters not herein provided.

(H) Notices of intervention and petitions to intervene in the complaint proceeding may be filed with the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D. C. 20426, on or before August 30, 1973, in accordance with the Commission's Rules of Practice and Procedure (18 CFR 1.8 or 1.37).

By the Commission.

(SEAL) Mary B. Kidd,
Acting Secretary.

Appendix E

United States of America
Federal Power Commission

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.

Transwestern Pipeline Company	Docket No. RP73-101

ORDER DENYING MOTION TO VACATE AND SET ASIDE PRIOR ORDER AND GRANTING MOTIONS FOR STAY OF PROCEDURAL DATES

(Issued September 21, 1973)

On August 27, 1973, a joint motion was filed by Southern California Gas Company and Pacific Lighting Company (Movants) requesting the Commission to vacate and set aside its order issued May 31, 1973, which, *inter alia,* accepted for filing without suspension certain tariff sheets tendered by Transwestern Pipeline Company (Transwestern). In their filing, Movants also moved for a stay of the procedural dates established in the Commission's order issued August 1, 1973, which, *inter alia*, set procedural dates for the complaint hearing therein established. A motion for continuance of a procedural filing date was filed

by the People of the State of California and the Public Utilities Commission of the State of California (California) on September 7, 1973.[1]

This proceeding involves a filing by Transwestern of a proposed curtailment plan, which conformed in all respects to the Commission Policy Statement issued in Docket No. R-469, Order No. 467-B. Based on its conformity with the Policy Statement, the Commission by order issued May 31, 1973, accepted for filing, without suspension, Transwestern's tendered tariff sheets containing its proposed curtailment plan. Movants then filed a petition for rehearing of that order, which was denied by order issued August 1, 1973.[2] Movants instant motion to vacate and set aside essentially reiterates arguments similar to those contained in its petition for rehearing and consequently sets forth no new facts or principles of law which were not considered by the Commission when it issued its orders or which having now been considered warrant any change in those orders. Accordingly, Movants motions to vacate and set aside should be denied.

In their motion for stay and continuance, Movants and California, as well as the response of Transwestern, urge the postponement of the procedural dates to permit them to pursue their Court appeals. In support of its motion, California states that the stay of

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[1]In its answer filed on September 12, 1973, Transwestern supports the requests for continuance of the procedural dates.

[2]Movants and California have filed appeals of the May 31 and August 1 orders in the United States Court of Appeals for the Ninth Circuit, Case Nos. 73-2538 and 73-2665.

the procedural dates would not detrimentally affect the parties opposing its position since the curtailment plain opposed by it will be in effect and operative during the period required to obtain a determination of the Court appeals. Since California and Movants who also oppose the curtailment plan request the stay, we believe that the grant of the motion for stay would not be detrimental to the public interest.

The Commission finds:

(1) Good cause exists to deny the motion to vacate and set aside filed by Movants.

(2) Good cause exists to grant the motions for stay filed herein by Movants and California, as hereinafter ordered.

The Commission orders:

(A) The motion to vacate and set aside filed by Movants on August 27, 1973, is hereby denied.

(B) The motion for continuance of procedural date filed by California on September 7, 1973, and the motion for stay of the procedural dates established in our August 1, 1973, order filed by Movants on August 27, 1973, are hereby granted and the commencement of the hearing ordered in this proceeding is hereby postponed until further order of the Commission.

By the Commission.

(SEAL) Kenneth F. Plumb,
Secretary.

Appendix F

UNITED STATES CODE, TITLE 15

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any

manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company[1a] or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may sus-

pend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect;[1a] and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as pos-

sible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force and shall fix the same by order; *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the

Commission has no authority to establish a rate governing the transportation or sale of such natural gas. [52 Stat. 823 (1938); 15 U.S.C. § 717d]

SEC. 19 (a)[9] Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

(b)[9] Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States[10] for any

circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole of in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court

may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [52 Stat. 831 (1938); 15 U.S.C. § 717r]

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
SEP 26 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-350

PACIFIC LIGHTING SERVICE COMPANY AND SOUTHERN CALIFORNIA GAS COMPANY,

No. 75-359

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT GENERAL MOTORS CORPORATION IN SUPPORT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-350

PACIFIC LIGHTING SERVICE COMPANY AND SOUTHERN CALIFORNIA GAS COMPANY,

No. 75-359

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT GENERAL MOTORS CORPORATION IN SUPPORT

Respondent, General Motors Corporation ("General Motors"), through its Counsel, hereby files its Brief in support of the Petitions for a writ of certiorari filed before this Court by Pacific Lighting Service Company and Southern California Gas Company on September 5, 1975, and by the People of the State of

California and the Public Utilities Commission of the State of California on September 6, 1975, and respectfully prays that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered on April 25, 1975, in *Pacific Lighting Service Company et al.* v. *FPC*, —— F.2d ——, Nos. 73-2538 et al.

QUESTION PRESENTED

When a pipeline company files a proposed tariff change pursuant to § 4(d) of the Natural Gas Act, and customers of the pipeline lodge formal complaints under § 4(e) raising serious questions regarding the justness and reasonableness of the proposal, and no evidence whatsoever exists either for or against the proposed change, is the Federal Power Commission required to hold a hearing under § 4(e), in which the pipeline has the burden to prove the proposal just and reasonable, or does the Commission have discretion under § 4(e) to accept and make effective the proposed tariff and subsequently to conduct a hearing under § 5(a), thereby assigning the burden of proof to the complainants?[1]

SUPPLEMENTAL STATEMENT OF THE CASE

General Motors accepts the Statements of the Case as set forth by the Petitioners, with one important addition. Promptly following the issuance, on May 4,

[1] This case does not involve a closely-related question, often raised in the past, regarding the Commission's suspension powers under § 4(e). It is well-settled that the Commission's exercise of its suspension power is discretionary. *Arrow Transportation Company* v. *Southern Railway Company*, 372 U.S. 658 (1963). The question raised in this case concerns the Commission's duty to hold hearings under § 4(e).

1973, of public notice[2] of the new curtailment plan proposed by Transwestern Pipeline Company ("Transwestern"), several of Transwestern's customers, both direct and indirect, filed complaints specifically requesting that the Commission order formal hearings on the justness and reasonableness of Transwestern's proposal.[3] These formal complaints were timely-filed under § 4(e) prior to the May 22, 1973, deadline date established by the Commission's Notice, and prior to the Commission's May 31, 1973, Order[4] under review accepting Transwestern's proposed tariff sheets and permitting the new curtailment plan to go into effect without hearings under § 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e) (1970). In applications for rehearing[5] of the May 31 Order, these same parties once again raised serious questions regarding the justness and reasonableness of the proposal prior to the issuance of the second Order under review issued on August 1, 1973.[6]

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[2] Notice of Proposed Changes in FPC Gas Tariff, *Transwestern Pipeline Co.*, FPC Docket No. RP73-101 (May 4, 1973). (J.A. 21-22).

[3] Complaints were filed by the following parties: San Diego Gas & Electric Company (on May 18); Pacific Lighting Service Company and Southern California Gas Company, jointly (on May 22); and Southern California Edison Company (on May 22). (J.A. 25, 32).

[4] Order Accepting for Filing Tendered Tariff Sheets, Establishing Procedures, and Granting Interventions, *Transwestern Pipeline Co.*, FPC Docket No. RP73-101, 49 F.P.C. 1243 (May 31, 1973).

[5] J.A. 34-54. In addition, two parties filed applications after the thirty-day deadline but prior to the Commission's Order on Rehearing of August 1, 1973. (J.A. 55-70).

[6] Order Denying Rehearing and Reconsideration, Instituting Complaint Proceeding, and Establishing Procedures, *Transwestern Pipeline Co.*, FPC Docket No. RP73-101, 50 F.P.C. 343 (Aug. 1, 1973). (J.A. 70-76).

SUMMARY OF POSITION

Respondent, General Motors, operates various manufacturing facilities throughout the United States. Seven of these facilities consume substantial volumes of natural gas obtained from gas distribution companies served at least in part through the Transwestern system. Four of these plants are located in California, two are in Kansas, and one is in Missouri. Much of the natural gas consumed in these plants is used in industrial processing operations for which natural gas is the only practicable fuel, and thus General Motors is vitally concerned with the curtailment plan implemented by Transwestern.

General Motors firmly supports the position of Petitioners that the Orders of the Federal Power Commission under review are totally unsupported by any evidence, much less substantial evidence of record as required by § 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b) (1970). Indeed, it is only too obvious that the new curtailment plan proposed by Transwestern and approved by the Commission in this case was engendered not by an adjudicatory record (since no hearings have ever been held), but solely by the Commission's so-called Order No. 467-B,[7] which shortly following the issuance of the two Orders under review, was held to be not an "order" at all but a mere policy statement having no substantive effect. *Pacific Gas and Electric Company* v. *FPC*, 506 F.2d 33, 40-44 (D.C. Cir. 1974). General Motors also agrees with Petitioners that the decision of the Court of Appeals below

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[7] Order No. 467-B, Order Modifying Order 467, Statement of Policy, and Order Denying Motions for Reconsideration, *Utilization and Conservation of Natural Resources—Natural Gas Act*, FPC Docket No. R-469, 49 F.P.C. 583 (March 2, 1973); codified in 18 C.F.R. § 2.78(a) (1974).

is in clear conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Pacific Gas, supra.* In that case, the District of Columbia Circuit made it abundantly clear to the Commission that it could not apply Order 467-B in individual curtailment proceedings without first scheduling hearings under § 4(e) of the Natural Gas Act. 506 F.2d at 40-43. In the instant case, however, the Commission brushed aside Petitioners' (and others') requests that § 4(e) hearings be held on Transwestern's Order 467-B curtailment plan, and it scheduled limited hearings only under § 5(a), and then only after it permitted Transwestern's new plan to become effective on a final basis as a permanent plan. The Court below was fundamentally in error when it characterized the Commission's approval of Transwestern's proposed curtailment plan as merely "provisional," pending the outcome of the § 5(a) hearing.[8]

Because the decision of the Court of Appeals for the Ninth Circuit, for which Petitioners seek a writ of certiorari, affirms the Commission's Orders in this case, the decision—despite its brevity—raises serious questions regarding the efficacy of the protection afforded to consumers by the Natural Gas Act. The novel procedure employed by the Commission in this case permitted a totally unproven curtailment plan to go into effect on Transwestern's system as a final plan without hearings over numerous timely-filed protests of Transwestern's customers. At the very least, the Commission should have permitted Transwestern's proposed plan to go into effect pending hearings on its justness and reasonableness under § 4(e) of the Natural Gas Act, in which the plan's proponent, Trans-

[8] Pacific Lighting Serv. Co. et al. v. FPC, — F.2d —, Nos. 73-2538 et al. (9th Cir. April 25, 1975), slip op. at 2-3.

western, would have borne the burden of proof. Instead, the Commission, after the plan went into effect, scheduled hearings only under § 5(a), in which the consumers opposing the plan would bear the burden of proof. If the decision of the Court of Appeals is not reversed by this Court, it will create a major gap in the procedural safeguards afforded to consumers not only by the Natural Gas Act but also by similar regulatory statutes.

REASONS FOR GRANTING THE WRIT

I. The Differences Between a Section 4(e) Hearing and a Section 5(a) Hearing Are Substantial.

As this Court recently noted in *FPC* v. *Louisiana Power & Light Company*, 406 U.S. 621, 643 (1972), the Natural Gas Act, 15 U.S.C. §§ 717 et seq. (1970), provides two procedural mechanisms—§ 4(c), (d), and (e) and § 5(a)—for the evaluation of curtailment plans. The Court also noted that "[t]he § 5(a) procedure has substantial disadvantages, however, *rendering it unsuitable for the evaluation of curtailment plans.*" (emphasis added). 406 U.S. at 643.[9] The two reasons given by the Court were: (1) that the Commission can take no remedial action under § 5(a) until after completion of a full hearing on a curtailment plan, and (2) that a remedial order issued under § 5(a) can have prospective application only. 406 U.S. at 643-44.

General Motors respectfully submits that the facts of this case illustrate yet another reason why § 4(e) provides appropriate procedures for the evaluation

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[9] *Accord*, Michigan Power Co. v. FPC, 494 F.2d 1140, 1144 (D.C. Cir. 1974); Atlanta Gas Light Co. v. FPC, 476 F.2d 142, 148 (5th Cir. 1973).

of curtailment plans proposed by jurisdictional pipeline companies, while § 5(a) does not. As stated in the last sentence of § 4(e), "the *burden of proof* to show that the increased rate or charge is just and reasonable *shall be upon the natural-gas company, . . .*" (emphasis added). In *FPC* v. *Louisiana Power & Light Company, supra,* this Court interpreted this provision to mean that, when a curtailment plan (rather than a rate increase) is proposed by a pipeline company under § 4, the ". . . pipeline has the burden of proving that its plan is reasonable and fair." 406 U.S. at 646. *Accord, Pacific Gas and Electric Company* v. *FPC,* 506 F.2d 33, 43 (D.C. Cir. 1974). Under § 5(a), however, the burden of proof normally is shifted to the party attacking a tariff.[10]

The assignment of the burden of proof in administrative proceedings under the Natural Gas Act, which necessarily depends on the choice of whether a § 4(e) or a § 5(a) hearing is to be held, is deeply-rooted in the legislative evolution of the Natural Gas Act, as well as other major regulatory statutes providing for similar hearing procedures.[11] Under the original Interstate Commerce Act of 1887 (which, as amended, served as the model for the Natural Gas Act), a carrier did not bear the burden of proving that its proposed new rates were just and reasonable, and it could establish new rates simply by filing a schedule of the new rates with the ICC and by furnishing copies of the schedule to its

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[10] FPC v. Texaco Inc., 417 U.S. 380, 389 (1974); American Smelting and Ref. Co. v. FPC, 494 F.2d 925, 940-41 (D.C. Cir.), *cert. denied,* Southern California Gas Co. v. FPC, 419 U.S. 882 (1974); State Corp. Comm'n. of Kansas v. FPC, 206 F.2d 690, 713 (8th Cir. 1953), *cert. denied,* 346 U.S. 922, *rehearing denied,* 347 U.S. 1002 (1954).

[11] These statutes are listed at page 16 of the text, *infra.*

freight offices.[12] Although carriers had a duty under the statute to charge only "just and reasonable" rates, the remedy available to consumers assessed unreasonable rates was limited to a suit at common law for damages.[13] In 1906, the ICC was empowered by the Hepburn Act[14] to determine the justness and reasonableness of rates already in effect under what is now § 15(1) of the Interstate Commerce Act,[15] the analogue of § 5(a) of the Natural Gas Act. In 1910, the Mann-Elkins Act[16] empowered the ICC to hold hearings on proposed new rates under what is now § 15(7) of the Interstate Commerce Act,[17] which is the analogue of § 4(e) of the Natural Gas Act. In a hearing held under § 15(7), the ICC was fully empowered to suspend proposed rates, to order refunds, and to hold hearings prior to the time that proposed new rates went into effect. Moreover, for the first time, the burden to prove the justness and reasonableness of a proposed new rate increase was imposed on the carrier.[18] More recently, with the passage of the Administrative Procedure Act in 1946, Congress made it clear that, as a general rule,

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[12] Texas & Pac. Ry. Co. v. Cisco Oil Mill, 204 U.S. 449 (1907).

[13] Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

[14] 34 Stat. 589.

[15] 49 U.S.C. § 15(1) (1959).

[16] 36 Stat. 552.

[17] 49 U.S.C. § 15(7) (1959).

[18] 36 Stat. 552. In 1940, the burden of proof provision in § 15(7) was amended to its present form to impose the burden of proof on the carrier with respect to any change in rate, fare, charge, classification, rule, regulation, or practice. 54 Stat. 912; 49 U.S.C. § 15(7) (1959).

the proponent of change in administrative proceedings should bear the burden of proof.[19]

Consequently, twenty-three years after passage of the original Interstate Commerce Act, Congress firmly established the fundamental proposition that the regulated entity should bear the burden of demonstrating the justness and reasonableness of its tariff proposals. As noted, this fundamental legislative decision has been repeatedly reaffirmed in the major regulatory acts modeled after the Interstate Commerce Act and in the Administrative Procedure Act. Congress has undoubtedly recognized that consumers—the persons to be protected by these regulatory acts—would find it unduly burdensome, if not virtually impossible, to prove that a tariff proposed by a regulated entity is unjust and unreasonable. In matters depending for their resolution upon substantial and detailed technical data, virtually all of which is in the custody and possession of the regulated entity, even the most diligent consumer effort to challenge a proposal by a regulated entity will have difficulty succeeding. Only if the burden of proof is placed on the regulated entity proposing a change are the odds made somewhat even.

For example, if a pipeline company proposed under § 4(d) to double its rates, an effective challenge to the proposal would require extensive knowledge of the pipeline's markets as well as its operations. As guardian of consumer interests, the Commission must not be permitted to shackle consumers in their effort to counter the pipeline's proposal by employing the novel procedure utilized in this case: (1) permit the pro-

[19] Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d) (1967), originally enacted in 1946, reads:

> (d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. . . .

posal to go into effect over consumer protests filed under § 4(e), without first holding hearings under § 4(e) in which the pipeline would bear the burden of proof; (2) refuse to suspend the effectiveness of the proposal or to provide for refunds; and (3) after the new tariff has gone into effect, treat the protests as complaints filed under § 5(a) and order hearings to be held under § 5(a), thereby imposing the burden of proof on the complainants and rendering the Commission powerless to grant retroactive relief at a later date should the consumers ultimately prevail in their effort to prove the tariff unjust and unreasonable.

2. Whenever a Formal Complaint Is Lodged with the Commission under § 4(e) Raising Serious Questions Regarding the Justness and Reasonableness of a Proposed Tariff Change Filed by a Pipeline under § 4(d), the Commission Is Required To Conduct a Full Hearing under § 4(e) on the Proposal and To Hold the Pipeline to Its Burden of Proof in § 4(e).

If a pipeline proposes a tariff change under § 4 of the Natural Gas Act, and no complaint is lodged questioning the justness and reasonableness of the proposal, the Commission may accept the proposal and permit it to go into effect without hearings.[20]

In this proceeding, however, several of Transwestern's customers timely filed formal complaints under § 4(e) prior to the issuance of the Commission's Orders under review, in which they raised serious questions regarding the justness and reasonableness of Transwestern's proposal. The filing of these complaints—so long as they were not frivolous—clearly triggered the requirement in § 4(e), as well as the gen-

[20] Pennsylvania Gas and Water Co. v. FPC, 463 F.2d 1242, 1251 (D.C. Cir. 1972); Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125, 1128 (D.C. Cir. 1969).

eral rule in § 7(c) of the Administrative Procedure Act, that the pipeline meet its burden of proving the justness and reasonableness of its proposal. In addition, § 4(a) of the Natural Gas Act requires that all tariffs must be "just and reasonable." The Commission's acceptance of a proposed tariff change under 4(e), coupled with a refusal to order hearings under § 4(e) in the face of complaints filed under § 4(e) urging such hearings, necessarily implies that the accepted tariff is in fact just and reasonable. Since § 19(b) of the Natural Gas Act explicitly requires the Commission to act on the basis of substantial evidence,[21] and since the Commission's Orders are final orders terminating the § 4 proceeding commenced by Transwestern's filing, the filing of the complaints by Transwestern's customers imposed upon the Commission the duty to ensure that its Orders were supported by substantial record evidence and thus precluded the Commission from effectuating Transwestern's proposal without also holding hearings under § 4(e).

Judicial precedent makes it clear that the Commission has no discretion to take summary action under § 4 of the Natural Gas Act, except in *pro forma* matters. It is well-settled that the Commission, over the complaint of a party filed under § 4(e), has no power summarily to accept a proposed new rate filed by a pipeline company under § 4(d) without first examining the complaint to determine whether it is frivolous.[22] It is also well-settled that the Commission may not summar-

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[21] 15 U.S.C. § 717r(b) (1970).

[22] United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956); FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1956); Shell Oil Co. v. FPC, 334 F.2d 1002, 1007 (3d Cir. 1964); Natural Gas Pipeline Co. v. FPC, 253 F.2d 3, 7 (3d Cir.), *cert. denied*, Dorchester Corp. v. Natural Gas Pipeline Co., 357 U.S. 927 (1958).

ily reject a proposal filed under § 4(d) if the filing complies with the requirements of the Commission's rules regarding the form of § 4 filings and the filing is not void on its face.[23] General Motors submits that, in view of these precedents, the Commission was powerless to ignore the complaints of Transwestern's customers (which the Commission did *not* find to be frivolous) and to accept summarily Transwestern's proposed new tariff, without ordering hearings under § 4(e) in order to evaluate the complaints in the light of substantial record evidence as required by § 19(b).

In the instant case, the Commission acted wholly without any evidence—much less substantial evidence —when it summarily accepted Transwestern's proposed tariff change over the protests of Transwestern's customers. This is necessarily the case, since no hearings previously had been held, and since the Commission scheduled hearings under § 5(a) only *after* the new plan went into effect. It should go without saying that the Commission cannot even begin to fill this evidentiary void with its Order 467-B,[24] since, as the Court of Appeals below[25] and the Petitioners here[26] have noted, Order 467-B is a mere policy statement having no binding substantive effect.

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[23] Municipal Light Bds., etc., Mass. v. FPC, 450 F.2d 1341, 1346 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); Mississippi River Fuel Corp. v. FPC, 202 F.2d 899, 901-902 (3d Cir.), *cert. dismissed*, 345 U.S. 988 (1953).

[24] Order No. 467-B, *supra*, note 7.

[25] Pacific Lighting Serv. Co. et al. v. FPC, — F.2d —, Nos. 73-2538 et al. (9th Cir. April 25, 1975) slip op. at 2.

[26] Petition of Pacific Lighting et al. at 15-16; Petition of the State of California et al. at 13.

3. The Opinion of the Court of Appeals, if Not Reversed by This Court, Will Have a Substantially Detrimental Impact on the Effectiveness of the Protection Afforded to Consumers by the Natural Gas Act, as Well as Similar Statutes, and Will Cause Serious Practical Problems in the Case at Bar.

If Petitioners prevail before this Court, the practical impact on Transwestern will be unnoticeable. It is not the position of Petitioners, nor is it the position of Respondent, General Motors, that the Commission should have *suspended* the effectiveness of Transwestern's proposed curtailment plan pending hearings on its lawfulness. Rather, the Commission should have held hearings under § 4(e) instead of under § 5(a). Thus, if Petitioners prevail, Transwestern would not be placed in the position of being without an effective curtailment plan when curtailments are necessary due to gas supply shortages.

However, the impact of the Ninth Circuit's decision will be quite substantial for Transwestern's customers. As noted by this Court on numerous occasions, the primary purpose of the Natural Gas Act is to protect consumers from unjust and unreasonable tariffs.[27] On a most rudimentary level, the fact that the Commission accepted Transwestern's proposed curtailment plan on a final basis, rather than pending § 4(e) hearings, over timely consumer protests and in the absence of any evidence, presents a major threat to the procedural safeguards provided in the Natural Gas Act for the protection of gas consumers. Indeed, this case

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[27] *E.g.*, FPC v. Tennessee Gas Transmission Co., 371 U.S. 145, 154 (1962); FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 19 (1961); Atlantic Ref. Co. v. Public Serv. Comm'n of N.Y. (CATCO), 360 U.S. 378, 388 (1959); Panhandle E. Pipe Line Co. v. Public Serv. Comm'n, 332 U.S. 507, 520 (1947); FPC v. Hope Natural Gas Co., 320 U.S. 591, 610 (1944).

presents no less a question than whether natural gas consumers have for their protection the law of the Natural Gas Act or merely the discretion of the Federal Power Commission.

To illustrate the inadequacy of the novel procedure utilized in this case, assume that the FPC issues a policy statement suggesting that, in order to assist the urban poor, all pipelines immediately should file rates providing a 50% discount to distributors serving cities with populations exceeding 500,000. All pipelines immediately respond (as Transwestern did in this case to Order No. 467-B) by filing proposed new tariffs under § 4(d) containing the suggested discount. The Commission is deluged with consumer protests filed under § 4(e). Nevertheless, the Commission accepts the proposed tariffs under § 4(e) without first providing for hearings, suspension, or refunds. After the rates go into effect, the Commission issues a further order in which it declares that the complaints filed under § 4(e) will be treated as having been filed under § 5(a), and it proffers the complaining consumers a § 5(a) hearing, thus making it very clear that they will bear the burden of proving the new rates unjust and unreasonable. Under such circumstances, can it reasonably be said that the Commission has adequately discharged its statutory duty to protect the public interest? Certainly the complaining consumers would say no. More importantly, who is to say, without substantial evidence, that the 50% discount will have the intended effect of benefitting the urban poor? Who is to say, without substantial evidence, that the urban poor should receive a benefit not made available to the rural or small-town poor? Yet, this plainly inadequate summary procedure is identical to the procedure utilized in this case.

The practical consequences for Transwestern's customers arising from this novel procedure are evident. As noted, shortly following the issuance of the Commission's Orders in this case, Order 467-B, upon which Transwestern f[illegible] obliged to model its proposed curtailment plan and which is the only alleged support for its plan, was held by the United States Court of Appeals for the District of Columbia Circuit to have no substantive effect.[28] One of the fundamental concepts of Order 467-B—the distinction between so-called "firm" service and so-called "interruptible" service—has been repudiated by the District of Columbia Circuit [29] as well as the Fifth Circuit [30] in the cases that so far have reached the courts of appeals to review the Commission's application of Order 467-B in adjudicatory proceedings looking toward the prescription of permanent pipeline curtailment plans. Thus, one of the major aspects of the Commission's preferred curtailment plan (Order 467-B) has thus far failed to withstand judicial scrutiny. Yet, the Ninth Circuit here would shift to consumers purchasing on an "interruptible" basis the burden of demonstrating that the "firm"-"interruptible" dichotomy of Order 467-B (as reflected in Transwestern's curtailment plan), as well as other significant aspects of the Order 467-B priorities, are unjust and unreasonable. The Commission's procedural legerdemain, through which it effectuated Transwestern's Order 467-B curtailment plan intact on a final basis, without ordering a § 4(e) hearing, should not be condoned where the economic stakes, in terms

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[28] Pacific Gas and Elec. Co. v. FPC, 506 F.2d 33, 40-44 (D.C. Cir. 1974).

[29] Arkansas Power & Light Co. v. FPC, — F.2d —, Nos. 73-1637 et al. (D.C. Cir. August 21, 1975) slip op. at 1638-39. *See also,* Consolidated Edison Co. of N.Y. v. FPC, 511 F.2d 372, 379-80 (D.C. Cir. 1974).

[30] State of La. v. FPC, 503 F.2d 844, 872 (5th Cir. 1974).

of jobs and the relative prosperity of substantial regions of the nation, could be so high.[31]

The Ninth Circuit's decision also raises serious questions regarding the effectiveness of other regulatory statutes that, like the Natural Gas Act, contain hearing procedures modeled after those first enacted by Congress for the Interstate Commerce Act and presently embodied as § 15(1) and §15(7) of that Act.[32] The other principal statutes of this type are: the Federal Aviation Act,[33] the Communications Act of 1934,[34] the Federal Power Act,[35] the Freight Forwarders Act,[36] the Motor Carrier Act,[37] and the Water Carrier Act.[38] Under all of these statutes, the decision of the Court of Appeals necessarily raises this question: whether a regulatory commission empowered to act under one of these statutes may summarily accept and make effective on a final basis not pending hearings a tariff change proposed by a regulated company where no evidence exists to support the proposed change and where the consumers that these statutes were enacted to protect raise serious questions regarding the lawful-

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[31] The practical importance of the assignment of the burden of proof in administrative proceedings was eloquently expressed by Judge Leventhal in his dissenting opinion (on an unrelated issue) in *Cities of Canton, Cleveland, and Massillon* v. *FPC*, 360 F.2d 521, 527 (D.C. Cir. 1966) as follows:

> [P]rotection of consumers typically lies in diligent attention to procedural requirements, particularly those involving the burden of proof and presentation resting on utilities which seek a change in revenues.

[32] 49 U.S.C. § 15(1), (7) (1959).

[33] 49 U.S.C. § 1482(d), (f), (g), (h) (1963).

[34] 47 U.S.C. §§ 204, 205 (1962).

[35] 16 U.S.C. §§ 824d(e), 824e(a) (1974).

[36] 49 U.S.C. § 1006(b), (e) (1963).

[37] 49 U.S.C. §§ 316(f), (g); 318(b), (c) (1963).

[38] 49 U.S.C. § 907(d)-(i) (1963).

ness of the proposed change. If the Ninth Circuit's opinion that the Federal Power Commission, under such circumstances, may refuse to require the regulated company proposing the tariff change to observe its burden to prove the change just and reasonable in a hearing initiated prior to the effectiveness of the new tariff and may assign the burden of proof to the complainants in a hearing initiated after the effectiveness of the new tariff, then necessarily the same principle will apply in proceedings before other regulatory commissions.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondent, General Motors Corporation, respectfully requests that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered on April 25, 1975, in *Pacific Lighting Service Company et al.* v. *FPC*, —— F.2d ——, Nos. 73-2538 et al.

Respectfully submitted,

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September 26, 1975

OCT 6 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-350

PACIFIC LIGHTING SERVICE COMPANY AND SOUTHERN CALIFORNIA GAS COMPANY,
Petitioners,

No. 75-359

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Petitioners,

v.

FEDERAL POWER COMMISSION, ET AL
Respondent.

On Petitions for a Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

BRIEF OF TRANSWESTERN PIPELINE COMPANY IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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October 6, 1975

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BRIEF OF TRANSWESTERN PIPELINE COMPANY IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The facts here are simple. Transwestern filed revised tariff sheets pursuant to the provisions of § 4 of the Natural Gas Act. Such sheets modified Transwestern's terms of service by setting out schedules of priorities to be followed in the event Transwestern's gas supplies became inadequate to satisfy its certificated requirements. Thirty days notice

was given, as required by the Act. When the Commission did not act to suspend, the revised tariff sheets became effective. Upon complaint, the Commission initiated a proceeding, pursuant to the provisions of § 5 of the Act to investigate the justness and reasonableness of the tariff sheets. Petitioners[1] complain of the Commission's failure to initiate a hearing under § 4 of the Act, arguing that it has the effect of shifting the burden of proof. The Ninth Circuit held that the Commission's decision to proceed under § 5 was discretionary, that it could not hold the Commission had abused its discretion and that any complaint with respect to the conduct of the § 5 proceeding could be examined on review of a final order issued therein.

ARGUMENT

Neither the Act nor This Court's Decision in the *Louisiana Power & Light Company* Case Compels the Result Sought by Petitioners

In contending that the Commission was required to conduct hearings under § 4, Petitioners misconceive the structure and mechanics of the Act with respect to the review of rates and tariff changes. Section 4 provides that no change shall be made "except after thirty days' notice to the Commission and to the public". It does not require a hearing. It states merely that upon any such filing, the Commission "shall have authority" to enter upon a hearing concerning the lawfulness of the classification specified in the revised tariff sheets and that pending such

[1] Petitioners, Pacific Lighting Service Company and Southern California Gas Company, are referred to as "Pacific Lighting". Petitioners, The State of California and the Public Utilities Commission of the State of California, are referred to as the "California PUC". General Motors Corporation, which submitted a brief in support of such petitions, is referred to as "GM". Transwestern Pipeline Company is referred to as "Transwestern". Respondent, the Federal Power Commission, is referred to as the "Commission".

hearing and decision the Commission "may suspend" the operation of the tariff sheets for a period no longer than five months beyond the time they would otherwise go into effect. This clearly vests the Commission with discretion. The Ninth Circuit correctly so held.[2]

With respect to tariff sheets which have become effective, the Commission is authorized by § 5 of the Act, on its own motion, or upon complaint, to conduct hearings to determine whether such rates, classifications or practices set forth therein are unjust, unreasonable, unduly discriminatory or preferential and to fix the rates, charges, and classifications to be thereafter observed and enforced. This, the Commission has undertaken to do. The interests of the Petitioners are thus fully protected.[3]

Petitioners complain that the Commission's decision *not* to initiate hearings under § 4 of the Act to review Transwestern's revised tariff sheets is not supported by substantial evidence. This is akin to saying that an evidentiary hearing must be held on each tariff change filing to determine whether a hearing should be held on such filing. Clearly the Act does not impose this requirement on the Commission. Indeed, no substantial evidence question exists. The revised tariff sheets became effective pursuant

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[2] It is well established that the determination of whether or not to suspend revised tariff sheets, lawfully filed, is a matter committed solely to the discretion of the Commission with respect to which no right of judicial review exists. *Aberdeen & Rockfish Ry.* v. *SCRAP*, ... U.S. ....., 43 U.S.L.W. 4844, (June 24, 1975); *United States* v. *SCRAP*, 412 U.S. 669 (1973); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963); *Municipal Light Boards* v. *F.P.C.*, 450 F.2d 1341 (D.C. Cir. 1971). Confronted with this authority, Petitioners and GM are careful to disclaim any intent to seek review of the Commission's action in not suspending Transwestern's revised tariff sheets. (See Pacific Lighting petition, p. 24; GM Brief, p. 2).

[3] Whether the Commission could permit revised tariff sheets setting forth curtailment plans to go into effect over objection without hearing under either § 4 or § 5 of the Act is not at issue here.

to the operation of § 4 of the Act, not the Commission's May 31, 1973 order.[4]

As this Court held in *Mobile*,[5] § 4 of the Act is self-executing. It requires only that "notice" of tariff changes be given by natural gas companies. Unless the Commission acts, the change becomes effective pursuant to the provisions of the Act. Specifically, the Court stated:

> "Section 4(d) provides not for the filing of 'proposals' but for *notice* to the Commission of any 'change . . . made by' a natural gas company, and *the change is effected if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action.* If the purported change is one the natural gas company has the power to make, the 'change' is completed upon compliance with the notice requirement and the new rate has the same force as any other rate — it can be set aside only upon being found unlawful by the Commission." (emphasis supplied) 350 U.S. at 342.

While Transwestern's revised tariff sheets set forth changed conditions of service in a manner consistent with the Commission's Statements of General Policy, Transwestern had the power to make such tariff filings had such policy statements never issued. The Commission was likewise free, under § 4 of the Act and without regard to its Statements of General Policy, to decline to suspend or enter upon a hearing with respect to Transwestern's revised tariff sheets. Petitioners' complaints about

---

[4] Pacific Lighting undertakes to seize upon a statement in the Commission's brief below to the effect that the May 31, 1973 order, permitting Transwestern's revised tariff sheets to go into effect, was supported by substantial evidence. (See PL Petition, p. 12-19). This statement was corrected by Commission counsel on oral argument. Excerpts from the Reporter's transcript of the proceedings are set forth in Appendix A to this Brief.

[5] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

the Commission acting pursuant to its statements of policy in Orders Nos. 431, 467, 467-A, and 467-B are thus beside the point.

Nor does this Court's decision in *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972) support Petitioners. The Court did not purport to write § 5 out of the Act as a review vehicle for curtailment plans. To the contrary, it emphasized the "broad powers" and "flexibility" which the Commission had under the Act to implement curtailment plans. In this respect, the Court stated:

> "Since curtailment programs fall within FPC's responsibilities under the head of its 'transportation' jurisdiction, the Commission must possess broad powers to devise effective means to meet these responsibilities. FPC and other agencies created to protect the public interest must be free, 'within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.'" 406 U.S. at 642.

The Court does not hold or intimate at any point in its decision that hearings on revised tariff sheets setting forth curtailment priorities *must* be conducted under § 4 of the Act. Rather, it recognizes specifically the Commission's authority to review curtailment plans under § 5 of the Act, stating that in such hearings the Commission would have "emergency authority to issue interim orders effecting a curtailment plan", 406 U.S. at 644, n. 18, and further, that when the public interest required, the Commission could accept the filing and "implement it immediately". 406 U.S. at 645.

In permitting Transwestern's filing to take effect immediately and initiating a hearing under § 5 of the Act pursuant to the complaint of the California PUC, the Commission was exercising the "broad powers" to which this

Court referred and was acting within the scope of its discretion and authority. Moreover, to the extent it has placed the burden of proof on petitioners to support their complaints and objections to Transwestern's curtailment plan, it has acted in entirely "pragmatic" manner.[6]

As the Commission's May 31, 1973 Order states, Transwestern's revised tariff sheets set forth curtailment procedures solely with respect to its CDQ Rate Schedules. It has only two purchasers under these rate schedules, Pacific Lighting Service Company and Cities Service Gas Company. Sales to these customers account for approximately 99% of its total sales volume (see PL Petition, Appendix p. 7). Unlike United in the *LP&L* case, Transwestern makes no direct sales of significant volumes. It has no "unique knowledge of its customers' needs, ability to substitute other fuel sources or other relevant [customer-related] considerations" (*Louisiana Power & Light Co.*, 406 U.S. at 645). It has no control over the disposition of the volumes which it sells to Pacific Lighting and Cities Service and has no knowledge, other than that furnished by such parties, of how volumes sold by it are used. It would be required to rely on data made available by Petitioners and Cities Service in any proceeding reviewing its revised tariff sheets and any presentation it might make with respect to the end-use of such volumes would, of necessity, be based on facts provided by these parties and not from any knowledge of its own.

Under these circumstances, the Commission acted within the scope of its statutory authority and discretion in

[6] This assumes that in a hearing under § 4 of the Act, Transwestern would have the burden of proof. While there is dictum in the *LP&L* case supporting this contention, the Act does not so provide. *Cf. American Louisiana Pipeline Co.* v. *F.P.C.*, 344 F.2d 525 (D. C. Cir. 1965).

requiring the parties having the facts to support their complaints. Those who assert that their peculiar circumstances make the general orders of priority approved by the Commission and incorporated in Transwestern's revised tariff sheets unreasonable, discriminatory or preferential should have the burden of establishing the facts which support their conclusion. This is all the Commission has undertaken to do. Contrary to Pacific Lighting's complaint that the Commission has "shifted" the burden of proof, it has simply placed it where it properly belongs.

The Commission's action was correct. The Ninth Circuit's decision was correct. Petitioners are fully protected, as a practical matter, by the proceedings which the Commission has initiated under § 5 of the Act. The burden of proof was properly placed on the parties attacking the tariff sheets in effect pursuant to the mechanics of the Act and having access to the information.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM TRANSCRIPT OF ORAL ARGUMENT BEFORE THE NINTH CIRCUIT HELD ON APRIL 3, 1975

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* * *

MR. STAFFIER: I would like to make one thing clear here. I am afraid in rereading our brief there may have been some confusing statements in there. First of all, the Commission did not find that the Transwestern curtailment plan was just and reasonable because it conformed with Order 467. That would have been improper because 467 was not a Rule and, therefore, does not provide evidence upon which to make a finding of justice [sic] and reasonableness. That is exactly not what they did. All they did is say that it conformed to 467 and therefore we are going to exercise our discretion not to suspend it and not to embark upon a Section 4 hearing. It was not a finding of justness and reasonableness, and there is no need for substantial evidence. (Tr. 30-31).

• • •

MR. STAFFIER: Before the Commission could make any finding with regard to the justness and reasonableness of a conforming plan such as Transwestern's, everybody would have the opportunity to be heard because it would not make that finding until after the completion of the Section 5 hearing. You see, there is the [sic] requirement that the Commission find a file [sic] tariff to be just and reasonable when it is filed, and it did not do so here. It didn't purport to find this claim [sic] to be just and reasonable. (Tr. 33).

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-350

PACIFIC LIGHTING SERVICE COMPANY AND SOUTHERN CALIFORNIA GAS COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION

No. 75-359

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF CALIFORNIA, PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-5)[1] is not reported. The initial order of the Fed-

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 75-350.

eral Power Commission (*id.* at 6-9) and its order denying rehearing and reconsideration (*id.* at 10-14) are reported at 49 FPC 1243 and 50 FPC 343. The Commission's order denying a motion to vacate (*id.* at 15-17) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1975 (*id.* at 1). Petitions for rehearing were denied on June 9, 1975 (*id.* at 18). Petitions for a writ of certiorari were filed on September 5 and 6, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the court of appeals correctly determined that the Federal Power Commission did not abuse its discretion in declining to institute a hearing under Section 4(e) of the Natural Gas Act, and instead instituting a hearing under Section 5(a) of the Act, to review the lawfulness of a pipeline's curtailment plan.

STATUTES INVOLVED

The relevant provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, are set forth at Pet. App. 19-24.

STATEMENT

In April 1973, Transwestern Pipeline Company, anticipating an inadequate supply of natural gas to

meet all of its customers' demands, tendered for filing with the Federal Power Commission under Section 4(d) of the Natural Gas Act, 15 U.S.C. 717c(d), revisions of its natural gas tariff, to take effect on June 1, 1973, establishing procedures for the curtailment of deliveries in the event of deficient supply. The Commission determined (Pet. App. 8) that "the Transwestern filing reflects priorities for curtailment consistent with our Statement of Policy" on curtailment priorities for pipelines.[2] Although several intervenors (petitioners in No. 75-350) requested the Commission to invoke its authority under Section 4(e) of the Act, 15 U.S.C. 717c(e), to suspend the operation of the tendered tariff revisions for the maximum five-month period and to institute a hearing concerning their lawfulness, the Commission, stating that "no specific grounds are stated in support of the requested suspension" (Pet. App. 8), ordered that the revisions be accepted for filing and declined to suspend their operation or to order a hearing under Section 4(e) (*id.* at 8-9). At the same time, the Commission authorized all the petitioners herein, customers of Transwestern, to intervene in the proceeding, and it stated that each could "file a petition for extraordinary relief from application of the filed curtailment plan or file a complaint under Section 5(a) of the Natural Gas Act, if [its] objections re-

[2] The Statement of Policy, Order No. 467, is set forth at Pet. App. 31-37. Subsequent amendments to that order are set forth at Pet. App. 38-53.

late instead to systemwide aspects of the curtailment plan" (*id.* at 8).

Petitioners filed applications for rehearing reiterating their request that the Commission order a hearing under Section 4(e) of the Act prior to permitting Transwestern's plan to become effective. The Commission determined that, since petitioners' "concern appears to be directed more to their position on the [curtailment] priority scale than [to] * * * the impropriety of the priorities themselves[,] * * * the need to initiate a Section 4 hearing to determine the lawfulness of the priorities *per se* has not been demonstrated" (*id.* at 11). While the Commission accordingly denied rehearing, it determined that "[t]he pleadings present issues that, in our judgment, should be adjudicated on the basis of an evidentiary record" (*ibid.*). It therefore construed California's [3] application for rehearing as a complaint filed under Section 5 and ordered the commencement of a hearing under that Section, in which "California, as complainant may have the opportunity to present evidence to sustain its burden of showing" that the curtailment plan ~~its burden of showing" that the curtailment plan~~ unduly discriminates against California's customers or that the plan's priorities should be altered in certain respects (*id.* at 11-12).[4]

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[3] "California" refers to petitioners in No. 75-359.

[4] The Commission thereafter stayed commencement of the Section 5 hearing in order to permit petitioners to seek judicial review of the Commission's orders (Pet. App. 15-17).

The court of appeals dismissed petitions for review of the Commission's orders (*id.* at 2-5). The court held that "the holding of hearings under [Section 4 of the Act is] discretionary rather than mandatory" and that the Commission did not abuse its discretion "on the facts before it in these cases" in ordering, instead, hearings under Section 5 (*id.* at 4). "The Commission's choice of § 5 as the hearing format for evaluation of objections to Transwestern's curtailment plan does shift the burden of proof,[5] but does not necessarily deprive the petitioners of a full and fair opportunity to present facts bearing upon the reasonableness of the curtailment priorities" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

Petitioners argue that the Commission was required to order a hearing under Section 4(e) of the Act on the lawfulness of Transwestern's tariff revisions before permitting them to become effective, that the Commission's determination to hold a Section 5 hearing instead of a Section 4 hearing unlawfully shifts the burden to them to show that the tariff revisions are unjust and unreasonable, and that permit-

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[5] In a hearing instituted by the Commission under Section 4(e), unlike a hearing instituted under Section 5(a), "the pipeline has the burden of proving that its plan is reasonable and fair" (*Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 645).

ting the tariff revisions to become effective was improper because the action is not supported by substantial evidence. Those arguments misconceive the structure of the Act.

1. As this Court stated in *Federal Power Commission* v. *Louisiana Power & Light Co.*, *supra*, the Act provides "[t]wo procedural mechanisms" (406 U.S. at 643) by which the Commission may review the lawfulness of a curtailment plan. When the plan is tendered for filing, the Commission, under Section 4(e), "may suspend the amended tariff for up to five months, at the end of which time the amended tariff becomes effective pending the completion of hearings" (*id.* at 645). Alternatively, the Commission may allow the plan to take effect and, upon a complaint or on its own motion, institute a hearing under Section 5(a). If, under either procedure, the Commission determines that the plan "is unjust, unreasonable, unduly discriminatory, or preferential," it may fashion a lawful plan and order its implementation (15 U.S.C. 717d(a); see also 15 U.S.C. 717c(e)).

Petitioners contend that the Commission was required to order a hearing under Section 4(e) before permitting the tariff revisions to become effective. Section 4(e) authorizes but does not compel the Commission to order a hearing prior to a plan's effectiveness. It provides that "the Commission shall have authority * * * to enter upon a hearing * * *." "Section 4(e) merely defines the power of the Commis-

sion; it *does not require* the FPC either to suspend a rate or to hold a hearing without suspension at the behest of a customer" (*Pennsylvania Gas & Water Co.* v. *Federal Power Commission*, 463 F. 2d 1242, 1245 (C.A. D.C.) (emphasis in original)).

Nothing in this Court's opinion in *Louisiana Power & Light* suggests the contrary. The Court there held that the Commission *may* properly proceed under Section 4 rather than Section 5. In explaining why the Commission had "chosen to process curtailment plans under §§ 4(c), (d), and (e)" (406 U.S. at 644), the Court noted the "substantial disadvantages" (*id.* at 643), from the standpoint of the public interest rather than the interest of private litigants, of the Section 5 procedure. It recognized, however, that both "procedural mechanisms are available" (*ibid.*).

The court of appeals here correctly held that the circumstances of this case justified the Commission's determination to proceed under Section 5 rather than Section 4. As the Commission stated (Pet. App. 11), petitioners' objections to Transwestern's curtailment plan related not so much to its unlawfulness *per se* but rather to the particular impact its priorities would have on petitioners' customers. The Commission reasonably concluded that those particularized complaints, while calling for "adjudicat[ion] on the basis of an evidentiary record" (*ibid.*), could most appropriately be considered in a Section 5 proceeding, in which petitioners would have an opportunity

to demonstrate the alleged discriminatory impact of the plan on their customers.

2. That the burden of proof in such a proceeding falls on the complaining parties rather than on the pipeline does not invalidate the Commission's choice. That consequence follows under the terms of the statute whenever the Commission elects to proceed under Section 5 instead of Section 4. If, as we have shown, the Commission has discretion to make that election, its choice can hardly be challenged on the ground that the statute thereby places the burden of proof on a different party. What is important, as the court of appeals correctly stated, is that petitioners are accorded "a full and fair opportunity to present facts bearing upon the reasonableness of the curtailment priorities" (Pet. App. 4). Any complaint that petitioners may have concerning the conduct of the hearing may, of course, be made the subject of judicial review after the Commission reaches a decision based upon the hearing record.

3. Petitioners argue that the Commission's order in this case—which accepted Transwestern's tariff revision for filing, declined to suspend the operation of the curtailment plan, and declined to order a hearing under Section 4(e)—is not supported by substantial evidence. The Commission could have rejected the plan for filing if it had been "patently * * * either deficient in form or a substantive nullity" (*Municipal Light Boards* v. *Federal Power Commission*, 450 F. 2d 1341, 1345 (C.A. D.C.), certiorari denied, 405

U.S. 989). Petitioners do not contend that Transwestern's plan should have been rejected under that standard. Nor do they seek review of the Commission's determination not to suspend the operation of the plan (see Pet. No. 75-350, p. 24), for "it is settled that the refusal to suspend a filed rate is a nonreviewable exercise of agency discretion" (*Municipal Light Boards* v. *Federal Power Commission, supra,* 450 F. 2d at 1351).

Petitioners claim only that the Commission should have ordered a Section 4 hearing before allowing the plan to become effective. A tariff revision accepted for filing with the Commission under Section 4(d) of the Act, however, becomes effective, not because of any Commission action ordering its effectiveness, but by operation of the statute. As this Court stated in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 342:

> Section 4(d) provides not for the filing of "proposals" but for notice to the Commission of any "change . . . made by" a natural gas company, and the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action. If the purported change is one the natural gas company has the power to make, the "change" is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission. * * * Likewise, no "proceeding" is "initiated" by a

> § 4(d) filing. A proceeding to review the new rate may be initiated under § 4(e), but, if so, it is initiated by the Commission * * *.

To the extent that petitioners seek to challenge the curtailment plan on the merits, therefore, the proper procedure is to present their evidence and arguments in the Section 5 hearing that the Commission has instituted and (if necessary) to seek judicial review of the Commission's final decision. The Commission's findings in that proceeding will be subject to review under the substantial evidence standard. See Section 19(b) of the Act, 15 U.S.C. 717r(b).

The Commission's determination not to institute a Section 4(e) hearing, however, if it is reviewable at all, may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706(2)(A)). Since the decision *whether* to institute a Section 4(e) hearing obviously is not required itself to be "based on a public adjudicatory hearing" (*Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 414), review under the substantial evidence standard is not authorized. See 5 U.S.C. 706(2)(E).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1975.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-350

PACIFIC LIGHTING SERVICE COMPANY AND SOUTHERN CALIFORNIA GAS COMPANY,

No. 75-359

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONERS AND FOR RESPONDENT GENERAL MOTORS CORPORATION IN REPLY TO BRIEF FOR RESPONDENT FEDERAL POWER COMMISSION

Petitioners, Pacific Lighting Service Company and Southern California Gas Company ("Pacific Lighting et al.") and the People of the State of California and the Public Utilities Commission of the State of California ("California et al."), and Respondent, General Motors Corporation, ("General Motors"), through their Counsel, hereby file their Brief in reply to the Brief for Respondent, Federal Power Commission ("Commission") in Opposition.

The Commission, in its Brief, has stated several times [1] that it is the position of Petitioners that the Commission, inter alia, was required to order hearings under Section 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e) (1970), *before* permitting the new curtailment plan proposed by Transwestern Pipeline Company to become effective. This characterization completely misconstrues the issue raised by Petitioners.

Such an argument by Petitioners would be tantamount to contending that the Commission should have *suspended* the effectiveness of the proposed curtailment plan pending the actual commencement and completion of Section 4 hearings. However, Petitioners have stated clearly that they are not objecting to the exercise of the Commission's suspension powers in this case, since the duty to hold Section 4(e) hearings does not depend on the exercise of the suspension power in Section 4(e).[2] Instead, Petitioners are contending only that the Commission was required to hold hearings under Section 4(e), in which the proponents of the proposed curtailment plan would bear the burden of proof, rather than under Section 5(a), in which the opponents of the plan would bear the burden of proof. Using this procedure, as clearly noted by Petitioners,[3] the Commission could permit the plan to go into effect without any suspension but pending the outcome of Section 4(e) hearings and subject to any modifications found necessary based on the proponents' failure to

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[1] See Brief for the Commission in Opposition at 4, 5, 6, and 9.

[2] Petition of Pacific Lighting et al. at 24; Petition of California et al. at 11-12. See also Brief for Respondent, General Motors, in Support at 2, n.1, and 13.

[3] Petition of Pacific Lighting et al. at 24; Petition of California et al. at 11-12. See also Brief for Respondent, General Motors, in Support at 5-6, 13.

sustain their burden of proof on the record ultimately compiled in such hearings.

Respectfully submitted,

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November 13, 1975